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Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

SIERRA PACIFIC POWER COMPANY,
Petitioner,

v.

THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEVADA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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QUESTIONS PRESENTED

1. May a state court, consistent with the Due Process Clause of the Fourteenth Amendment, deny vindication of a federal constitutional right on the ground that the claimant did not pursue a particular state law remedy, when that remedy was not made available until the state court decision overturned previously settled law which had barred the remedy?

2. May a state court, consistent with the Due Process Clause of the Fourteenth Amendment, deny vindication of a federal constitutional right by retroactively applying a new interpretation of previously settled state law, without affording the claimant any notice or opportunity to be heard on factual questions that were implicated only by the court's unforeseeable change in the law?

PARTIES TO THE PROCEEDINGS

Petitioner and plaintiff-respondent below Sierra Pacific Power Company is a public utility corporation organized under the laws of Nevada. Pursuant to Supreme Court Rule 28.1, petitioner notes that its stock is wholly-owned by Sierra Pacific Resources, which also owns all of the stock of Lands of Sierra, Inc., and Sierra Energy, Inc. Respondent and defendant-appellant below Public Service Commission of the State of Nevada is a state agency.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

Petitioner Sierra Pacific Power Company respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Nevada Supreme Court entered in the above-entitled proceeding on March 31, 1987.

OPINIONS BELOW

The opinion of the Nevada Supreme Court is reported at —— Nev. ——, 734 P.2d 1245, and is reprinted in the appendix hereto ("App.") at 2a. The order of the Second Judicial District Court of Nevada (Agosti, J.) is unreported, and is reprinted at App. 15a. The oral decision of the Public Service Commission of Nevada is unreported and is reprinted at App. 23a.

JURISDICTION

Petitioner, a public utility corporation organized under the laws of Nevada, filed a petition with the Public Service Commission of Nevada on November 13, 1984, seeking recovery of certain expenses. The Commission declined to proceed with the petition on June 3, 1985. App. 23a. Petitioner sought review of the Commission's decision in the Second Judicial District Court of Nevada, and that court issued an order on March 25, 1986, reversing the Commission and ordering it to allow the expenses. App. 15a. The Commission appealed, and the Nevada Supreme Court reversed the state District Court in an opinion issued on March 31, 1987. App. 2a. A timely petition for rehearing was filed on April 15, 1987, and denied by the Nevada Supreme Court on August 27, 1987. App. 1a. The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. § 1257(3).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Nevada Revised Statutes § 704.100 provides, in pertinent part:

> 3. Except as provided in subsection 4 or in NRS 707.350, the commission shall not consider an application by a public utility if the justification for the new schedule includes any items of expense or rate base which are set forth as justification in a pending application, are the subject of pending litigation, or have been considered and disallowed by the commission or a district court.
>
> 4. A public utility may set forth as justification for a rate increase items of expense or rate base which have been considered and disallowed by the commis-

sion, only if those items are clearly identified in the application and new facts or considerations of policy for each item are advanced in the application to justify a reversal of the commission's prior decision.

5. If the commission receives an application that is within the prohibition of subsection 3, it shall, within 30 days, notify the public utility that the application is dismissed.

STATEMENT OF THE CASE

Petitioner Sierra Pacific Power Company ("Sierra Pacific") is a public utility corporation organized under the laws of Nevada. It owns and operates facilities for the generation, distribution, and sale of electricity in Nevada and California, and for the acquisition, distribution, and sale of water and natural gas in Nevada. Sierra Pacific is subject to the jurisdiction of the Public Service Commission of Nevada, a state agency charged with setting just and reasonable rates for public utilities.

On December 1, 1975, Sierra Pacific applied to the Commission for rate increases in its gas, water, and electric departments. Sierra Pacific claimed that it was entitled to these increases to cover certain "annualized operating expenses"—the costs for insurance, taxes, and depreciation—for 1975. The Commission disagreed, ruling that the expenses were not recoverable through a rate increase. Exercising its right under state law, Sierra Pacific promptly appealed the Commission's order to state District Court. Over three years later, the District Court ruled in favor of Sierra Pacific, apologizing for "the completely unreasonable delay and length of time involved in reaching the decisions in these cases." [1] The Commission itself then appealed, and over four years later the Nevada Supreme Court affirmed the District

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[1] Tr. of Decisions in Case No. 35063, Case No. 36104, and Case No. 36626, at 4-5 (1st Dist. Ct., Dec. 30, 1978).

Court "in all respects." *Public Service Comm'n* v. *Southwest Gas Corp.*, 99 Nev. 268, 278, 662 P.2d 624, 630 (1983). Through no fault of Sierra Pacific, it had taken almost eight years to establish that Sierra Pacific was entitled to recover its annualized operating expenses, as it had first claimed in 1975.

As noted, the litigation finally resolved by the *Southwest Gas Corp.* decision concerned annualized operating expenses for 1975. After announcement of that decision, Sierra Pacific promptly performed the necessary calculations and applied to the Commission for a surcharge that would allow it to recover the expenses to which it was now indisputably entitled. The Commission granted the surcharge.

Throughout this extended period of litigation, Sierra Pacific had continued to incur, each year, the same types of expenses that were the subject of the litigation. The year after Sierra Pacific filed its first request for annualized operating expenses, it filed another request for the same types of expenses for the succeeding year. The Commission dismissed the application, relying on Nev. Rev. Stat. § 704.100(3).[2] That statute provides that "the commission shall not consider an application by a public utility if the justification for the new schedule includes any items of expense or rate base which are set forth as justification in a pending application, are the subject of pending litigation, or have been considered and disallowed by the commission or a district court."

There is an exception to this prohibition, in Section 704.100(4):

> A public utility may set forth as justification for a rate increase items of expense or rate base which have been considered and disallowed by the commission, only if those items are clearly identified in the

[2] *In Re Sierra Pacific Power Co.*, Public Service Comm'n Docket Nos. 863, 864, and 865, at 6 (Sept. 17, 1976).

> application and new facts or considerations of policy for each item are advanced in the application to justify a reversal of the commission's prior decision.

The Commission ruled that Sierra Pacific could not invoke the exception because it was only available when the expenses had simply been disallowed by the Commission, not when there was pending litigation. As the Commission concluded:

> If Applicant did not have pending litigation in this case and the items of expense in dispute had only been considered and disallowed by the Commission, then the procedure followed by Applicant would have clearly been appropriate and within the exception set forth in NRS 704.100(3). However, in this case Applicant has elected to exercise its right of judicial review related to the Commission's disallowance of certain items of expense in [the 1975 application], and thereby has clearly filed the instant applications, including the same items of expense previously disallowed, in violation of NRS 704.100(3). Under the provisions of NRS 704.1[0]0(5) the Commission must dismiss the applications [for 1976] in their entirety. [*In Re Sierra Pacific Power Co.*, Public Service Comm'n Docket Nos. 863, 864, and 865, *supra*, at 6.]

The Commission ruled that even to consider Sierra Pacific's application "would go beyond the plain words and clear meaning of subsections 3 and 4 of NRS 704.100 and permit a public utility to have simultaneous cases containing the same disputed issues pending before the Commission and a district court." *Id.* at 8.

The Commission's order was the final word, at least until the pending litigation ended, since there was no right of appeal under state law from a commission order dismissing an application pursuant to Nev. Rev. Stat. § 704.100(5).[3]

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[3] State law at the time permitted an appeal only from a commission order fixing rates, *see* former Nev. Rev. Stat. § 704.540(1), and

After this conclusive and nonappealable rebuff from the Commission, Sierra Pacific appropriately waited until the litigation concluded before seeking annualized operating expenses for the years during which the litigation had been pending. After the Nevada Supreme Court finally concluded that Sierra Pacific was entitled to such expenses, Sierra Pacific applied to the Commission for an order awarding it annualized operating expenses of some 14 million dollars for the litigation years of 1976-1982. Even though the Nevada Supreme Court had upheld Sierra Pacific's right to annualized operating expenses, and even though the Commission itself had blocked Sierra Pacific's effort to recover such expenses during the pendency of the litigation, the Commission now declined to proceed with Sierra Pacific's application. As one Commissioner put it, "I think this is a matter for the courts." App. 27a.

Sierra Pacific appealed, and the District Court ordered the Commission to allow the expenses. App. 22a. The court held:

> As long as the disputed items of expense or rate base are the subject of pending litigation, a utility is absolutely forbidden by statute from applying to the Commission to obtain any relief for such items and the Commission is forbidden by statute from even considering any such application. This prohibition continues until litigation is concluded. [App. 19a.]

The court concluded that Nev. Rev. Stat. § 704.100 was intended to "merely defer the collection of wrongfully-

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the Nevada Supreme Court had just ruled that an order of dismissal under § 704.100(5) was *not* an order fixing rates and therefore could not be appealed. *Southwest Gas Corp.* v. *Public Service Comm'n*, 92 Nev. 48, 55, 546 P.2d 219, 223 (1976). *See* App. 19a-20a. This remained true throughout the period pertinent to this case. It was not until 1983 that the state legislature revised the statute and provided a right of appeal from commission orders of dismissal under § 704.100(5). *See* Nev. Rev. Stat. § 703.373.

withheld revenues or expenses pending final judicial outcome, rather than eliminate all right to their recovery." App. 19a. This intent was confirmed by "the legislature's failure to provide for any right of appeal from the dismissal of an application on the ground that [it] includes classes or categories of expense which are the subject of pending litigation in violation of NRS 704.100." App. 19a-20a.

Sierra Pacific "had no right to even claim the expenses during the period of litigation and the Commission had no power to consider such a claim." App. 21a-22a. Since Sierra Pacific could not claim the expenses when litigation was pending, it must be permitted to claim them after the litigation concluded and Sierra Pacific's right to them had been established. The District Court recognized that any other conclusion would

> deny to the utility its constitutional right to earn a fair and reasonable rate of return on property dedicated to public use in violation of the utility's Fourteenth Amendment right not to be deprived of property without due process of law. Moreover, such a construction would deprive the utility of any right to a hearing as well as the right to effective judicial review. [App. 20a.]

The Nevada Supreme Court, "despite certain misgivings," reversed. App. 5a. The court, in a per curiam opinion, acknowledged that the "legal symmetry" of Sierra Pacific's position was "difficult to resist." App. 7a.

> The Commission, having reasonably construed the statute as prohibiting its consideration of any applications for rate increases that include items of expense generically questioned in pending litigation, ostensibly left Sierra with no alternative other than to proceed with rate increase requests that omitted expense categories under challenge in the courts. Impliedly, recovery of such expenses would be deferred until a final adjudication of their allowability. If de-

> termined to be allowable, the expenses would be recoverable; if not, Sierra would have to absorb the loss. Any contrary view would appear to subject Sierra to a manipulated loss of property without a remedy, in short, a denial of due process. [App. 6a.]

The court attempted to avoid this conclusion by adopting an entirely new interpretation of the statute, one that was "contrary to the position of the parties and the trial court." App. 8a. Although it had ruled in 1976 that the Commission could consider expense items previously disallowed *only* after answering the question whether the items were the subject of pending litigation, *Southwest Gas Corp.* v. *Public Service Comm'n*, 92 Nev. at 58-60, 546 P.2d at 225-227, the court now announced that it made no difference whether litigation had been pending. According to the court, Nev. Rev. Stat. § 704.100(4) "will permit the Commission to reconsider its prior rulings concerning items of expense or rate base even though they are the subject of pending litigation," so long as the requirements of Subsection Four—"the involved items are clearly identified in the application and 'new facts or considerations of policy for each item are advanced in the application to justify a reversal of the Commission's prior decision' "—were met. App. 8a (quoting Nev. Rev. Stat. § 704.100(4)).

The court conceded that Sierra Pacific was "undoubtedly prejudiced by the Commission's formal position concerning the dictates of NRS 704.100(3) and (5)," and stated that it "would have little difficulty affirming the judgment of the trial court if our ruling impacted solely on the PSC." App. 10a. It refused to affirm because deferring Sierra Pacific's recovery of annualized operating expenses for 1976-1982 would mean that "many ratepayers who would pay the resulting surcharge would not have been consumers of Sierra's power during the relevant time period. Thus, many non-users would be forced to subsidize the loss which would otherwise fall upon Sierra." App. 10a (footnote omitted). The court found Sierra Pacific guilty of laches for waiting until the end

of the litigation to apply for annualized operating expenses, despite the Commission's unappealable ruling in 1976 that it was required to do so. App. 11a. According to the court, Sierra Pacific and the Commission had both departed on occasion from the view that the utility could not seek annualized operating expenses during the pendency of the litigation.

The court concluded its opinion by again recognizing that "if NRS 704.100 had prevented Sierra from seeking its annualized operating expenses during the pendency of litigation, Sierra's entitlement to recover at the successful conclusion of judicial review would have been clear. To conclude otherwise would be tantamount to a taking of property without due process of law." App. 13a. Although the court ruled that, under its new view of Section 704.100(4), Sierra Pacific could have applied for the expenses during the litigation, it did not address whether Sierra Pacific could have satisfied the requirement in Section 704.100(4) that "new facts or considerations of policy" be advanced for each expense item. The question was not considered by the parties, and there was no record evidence on it, since no one anticipated the court's ruling that Section 704.100(4) was even available. In denying Sierra Pacific any recovery of its expenses for failure to apply for them while the litigation was pending, the court below apparently assumed that Sierra Pacific could have met the "new facts or considerations of policy" requirement for each expense item each year during the pendency of the litigation.

At every stage of this litigation Sierra Pacific contended that failure to permit it to recover the annualized operating expenses for the years the litigation was pending would constitute a deprivation of property without due process of law.[4] Sierra Pacific did not, of course,

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[4] *See* Complaint at 8, 12; Pre-trial Brief of Sierra Pacific Power Company at 21-25; Answering Brief of Respondent Sierra Pacific Power Company before the Nevada Supreme Court at 28-32.

have any opportunity to object to the unconstitutional effect of the retroactive application of the new rule announced by the court below, or the finding of facts without a hearing by the court below, until that court rendered its decision. Sierra Pacific raised these specific constitutional objections at its earliest opportunity, in a timely-filed petition for rehearing. Petition for Rehearing at 1-2, 10. The present claims were thus raised in a timely fashion below. *See Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677-678 (1930); *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 85-86 n.9 (1980). The Nevada Supreme Court denied the petition for rehearing on August 27, 1987. App. 1a.

REASONS FOR GRANTING THE WRIT

I. The Court Below, by Retroactively Overturning Settled State Law, Deprived Sierra Pacific of Its Federal Constitutional Right to an Adequate Rate of Return

The Nevada Supreme Court confirmed Sierra Pacific's constitutionally-protected right to recover annualized operating expenses from its ratepayers, and then overturned a settled interpretation of state law to deny Sierra Pacific any means of vindicating that right. It did so to protect "the consuming public" from the burden of paying the rate surcharge necessary to reimburse Sierra Pacific for the expenses it had validly incurred. App. 11a. The Nevada Supreme Court is, of course, the final arbiter of Nevada law, and is free to adopt any interpretation of state law it pleases. Neither that court nor any other state court is free, however, to change settled state law to preclude, retroactively, the vindication of rights concededly protected by the Federal Constitution.

As Justice Brandeis wrote for the Court over fifty years ago, "[w]hether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is,

or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris*, 281 U.S. at 682 (footnote omitted). The court below ruled that Sierra Pacific could not recover expenses to which it was concededly entitled because it had not sought the expenses from the Commission during the pendency of the litigation. No one supposed that Sierra Pacific could do so, however, until the court below announced its decision in this case.

There can be no doubt that the decision below represented a dramatic change in settled state law. Until the decision below, it was clear that Nev. Rev. Stat. § 704.100 barred a utility from applying to the Commission for the same expense items that were subject to pending litigation. The statute expressly stated that the Commission "shall not consider" any application that includes items which are "set forth as justification in a pending application, are the subject of pending litigation, or have been considered and disallowed by the commission or a district court." Nev. Rev. Stat. § 704.100(3). The exception in Nev. Rev. Stat. § 704.100(4) only applied to the third of these categories—items "considered and disallowed by the commission"—and not to items which were the subject of pending litigation. *Id.*

The Nevada Supreme Court itself had made that clear in 1976 in *Southwest Gas Corp.* v. *Public Service Comm'n*, *supra*. There, the court ruled that the Commission must ask itself whether a utility application "include[d] as justification for the new schedule any items of expense or rate base which were the subject of pending litigation" before determining whether it could proceed with the application. 92 Nev. at 58, 546 P.2d at 225. The court ruled that the Commission should have considered the application at issue in that case only because the items were *not* the subject of pending litigation. 92 Nev. at 60, 546 P.2d at 226-227.

Any conceivable doubt on the question was removed when Sierra Pacific—out of an excess of caution—sought

to invoke the Subsection Four exception in 1976. The Commission promptly dismissed the application because the "plain words" and "clear meaning" of Section 704.100 barred invocation of the exception while litigation was pending. Sierra Pacific could not appeal that ruling. The plain language of the statute, the Nevada Supreme Court's prior interpretation, and the unappealable order of the Commission itself all confirmed that Sierra Pacific could not seek the expenses at issue while litigation was pending.

The court below was free, of course, to overturn its settled interpretation of Section 704.100. It was not free, however, to deprive Sierra Pacific of that company's right to recover annualized operating expenses on the ground that Sierra Pacific had not applied for them under Section 704.100(4), when that opportunity was plainly not available to Sierra Pacific at the time.

The facts of *Brinkerhoff-Faris, supra,* are remarkably similar. In that case a taxpayer brought suit, alleging discriminatory assessment of property in violation of the Fourteenth Amendment. The Missouri Supreme Court denied any relief, finding the taxpayer guilty of laches for failing to pursue its claim before the state Tax Commission. Until the court's decision, however, it had been settled under Missouri law that taxpayers could not seek such relief from the Commission. The state Supreme Court overturned that settled rule, and applied the new rule to the taxpayer before it, even though the passage of time now precluded that taxpayer from applying to the Commission.

This Court unanimously reversed. Justice Brandeis, writing for the Court, noted that "it would have been entirely futile for the plaintiff to apply to the Commission" in light of the previously settled state of the law. 281 U.S. at 679. So too here, given the Nevada Public Service Commission's definitive dismissal of Sierra Pacific's

1976 application, and the Nevada Supreme Court decision in *Southwest Gas Corp.* v. *Public Service Comm'n, supra*, it would have been entirely futile for Sierra Pacific to seek annualized operating expenses until the end of the litigation. Past failure to pursue an unavailable remedy cannot be held to preclude vindication of a federal constitutional right, simply because the state court changes the law to make the remedy available—too late for the plaintiff appearing before it. As this Court held in *Brinkerhoff-Faris*:

> If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property. [281 U.S. at 679.]

Since the Missouri court's finding of laches was based on the taxpayer's failure to pursue an unavailable remedy, the finding was "not sufficient independently to support the judgment." *Id.* at 682.

It made no difference, this Court held, that the deprivation of property was accomplished by a judicial interpretation of state law. Certainly if a state legislature or executive seized property by denying any available remedy to recover it, the constitutional violation would be obvious. In the present case, if the Nevada legislature passed a law decreeing that Sierra Pacific could not recover the 14 million dollars to which it was entitled, there would be no question that the law would deprive the company of property in violation of the Fourteenth Amendment. "The violation is none the less clear when that result is

accomplished by the state judiciary in the course of construing an otherwise valid state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government." *Brinkerhoff-Faris*, 281 U.S. at 680 (citations omitted).

If anything, the present case is even more egregious than *Brinkerhoff-Faris*. For it was not enough for the court below to overturn the settled interpretation of Nev. Rev. Stat. § 704.100, and to apply the new view of the law, retroactively, to Sierra Pacific. The court also had to assume the existence of facts necessary to bring Sierra Pacific within its new understanding of Section 704.100.

In barring any recovery because Sierra Pacific failed to pursue the Section 704.100(4) exception, the court below necessarily assumed that Sierra Pacific could have met the Subsection's preconditions—*i.e.*, that Sierra Pacific could have presented "new facts or considerations of policy for each item" subject to pending litigation every year from 1976 to 1982. Only then would the statutory exception, even as newly construed by the court below, have been available to Sierra Pacific. There was, of course, no evidence whatsoever of any "new facts or considerations of policy" in the record, since the question only became pertinent when the court below overturned everyone's prior understanding of the law and held that the exception was available for items subject to pending litigation.

Sierra Pacific was afforded no opportunity to be heard on the question, and the court below provided no clue as to what "new facts or considerations of policy" Sierra Pacific might have advanced to support seriatim reapplications to the Commission. The decision below thus not only dispensed with a required hearing, but

> is subject * * * to an objection even deeper. * * * From the standpoint of due process—the protection

> of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the [court] took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. [*Ohio Bell Telephone Co.* v. *Public Utilities Comm'n*, 301 U.S. 292, 302 (1937).]

The court below similarly deprived Sierra Pacific of any notice or opportunity to be heard when it concluded that Sierra Pacific had sought and obtained annualized operating expenses at certain points during the pendency of the litigation. *See* App. 9a-10a. This conclusion was critical to the court's ultimate judgment, *see* App. 11a, yet Sierra Pacific was afforded no opportunity to present evidence on the question, nor any opportunity to challenge the extra-record material on which the court below relied. If Sierra Pacific had been given such an opportunity—as required by due process—it would have been able to show that the Commission *never* awarded it annualized operating expenses in response to an application by Sierra Pacific during the pendency of the litigation.[5] This should come as no surprise, since it was of course the Commission's position that Sierra Pacific could not seek and the Commission could not award annualized operating ex-

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[5] The instances cited by the court below, *see* App. 9a, do not support its conclusion. In Docket No. 81-660, the Commission determined that the items sought by Sierra Pacific were *not* annualized expenses but rather "a recast of actual recorded data." *In Re Application of Sierra Pacific Power Co.*, Public Service Comm'n Docket No. 81-660, at 12 (Sept. 6, 1983). In Docket Nos. 80-2856, 2857, and 2858, the application did not concern annualized operating expenses but rather costs of additional employees actually hired during the year. In any event, the costs were not allowed by the Commission. *See In Re Application of Sierra Pacific Power Co.*, Public Service Comm'n Docket Nos. 80-2856, 2857, 2858, at 87 (Oct. 29, 1980). The only other instances cited by the court below were general rulemaking proceedings, rather than specific applications, which are not even covered by the express terms of Nev. Rev. Stat. § 704.100(3). As noted, Sierra Pacific had no opportunity to even raise these arguments below.

penses, in light of the plain dictates of Nev. Rev. Stat. § 704.100(3).[6]

Sierra Pacific was thus deprived of any "real opportunity to protect" its right to recover annualized operating expenses in two senses: (1) the court overturned existing law, ruling that Sierra Pacific should have availed itself of a remedy that was never actually available to it, and (2) the court found facts against Sierra Pacific without ever affording it an opportunity to be heard. *Brinkerhoff-Faris*, 281 U.S. at 682.

II. The Questions Presented Are Important and Recurring

This Court is naturally reluctant to conclude that an interpretation of state law by a state court effects an abrogation of federal rights. The decision below, however, is not an isolated occurrence. State courts, with increasing frequency, are upsetting settled understandings of state law in a manner that intrudes upon federal rights, rights that may be seen as interfering in some manner with state policies. When this problem has developed in the past, this Court has recognized its obligation to step in and ensure that the federal rights are not manipulated out of existence by retroactive changes in previously settled state law.

In the early decades of the present century, for example, States seeking new sources of revenue imposed taxes or asserted ownership of lands in a manner that frequently contravened federal rights. When state courts

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[6] *See In Re Sierra Pacific Power Co.*, Public Service Comm'n Docket Nos. 863, 864, and 865, *supra*, at 6-8. The lower court's objection that Sierra Pacific was not diligent in alerting consumers that it would seek to recover the expenses at issue after termination of the litigation was peculiarly unfounded, since Sierra Pacific sought to implement its right to the annualized operating expenses immediately after the 1978 District Court decision establishing the utility's entitlement to them. The Commission, however, successfully sought a stay of that decision, which was eventually affirmed.

joined in the effort, and issued rulings on state law that purported to block enforcement of the federal right, this Court did not consider itself disabled from acting. *See, e.g., Ward* v. *Board of County Commissioners of Love County*, 253 U.S. 17 (1920) (state court ruling that Indians exempt under federal law from taxation voluntarily paid taxes to the State and therefore could not recover them did not preclude enforcement of federal exemption); *Brinkerhoff-Faris, supra* (retroactive change in state law by state court cannot block assertion of claim that taxes were assessed in discriminatory manner); *cf. Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 88 (1922) ("It is not for a State *by courts* or legislature * * * to adopt a retroactive rule * * * which would destroy a title already accrued under federal law") (emphasis supplied).

With the onset of the Great Depression, not only state legislatures, *see W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56 (1935), but often state courts as well undertook to change settled state law to grant relief from contractual obligations. Here again this Court stepped in when state court changes in state law threatened to abrogate federal constitutional safeguards. *See, e.g., Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95 (1938) (state court could not avoid dictates of Contract Clause in Federal Constitution by overturning prior state court decisions holding that public school employment was contractual under state law).

The problem of state court decisions overturning previously settled state law arose with regrettable frequency as individuals claimed the protection of federal civil rights during the fifties and sixties. Once again this Court declined to permit such changes—even though they resulted from interpretations of state law by state courts—to block the vindication of federal rights. For example, in *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Alabama Supreme Court adopted a new in-

terpretation of state law, and declined to consider petitioner's federal constitutional claim because petitioner had pursued what was now held to be the wrong state law remedy. Justice Harlan, writing for a unanimous Court, held that the unforeseeable interpretation of state law could not operate to deprive petitioner of its federal rights:

> [A] local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights. *Cf. Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673. [357 U.S. at 457-458.]

See also NAACP v. *Alabama ex rel. Flowers*, 377 U.S. 288, 293-302 (1964); *cf. Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964) ("When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law").

The federal rights at issue in *Brinkerhoff-Faris*, *Indiana ex rel. Anderson* v. *Brand*, and *NAACP* v. *Alabama ex rel. Patterson* were all different, but in each case an unforeseeable interpretation of state law, retroactively applied, purported to block the federal right. In each case this Court declined to sanction such a result. Now state courts are once again overturning settled state law, as States attempt to do more with less in an era of economic readjustment. For example, in *McBryde Sugar Co.* v. *Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973), *cert. denied*, 417 U.S. 962 (1974), the Hawaii Supreme Court overruled numerous prior decisions under state law and held that the State—not private parties, as had pre-

viously been supposed—owned certain valuable water rights. The private parties sued in federal court, contending that the change in settled state law effected a taking of their property. The Ninth Circuit agreed, concluding that "[n]ew law * * * cannot divest rights that were vested before the court announced the new law." *Robinson* v. *Ariyoshi*, 753 F.2d 1468, 1474 (1985), *vacated and remanded for reconsideration on other grounds*, 106 S. Ct. 3269 (1986).

Cases similar to *McBryde Sugar* have become almost commonplace. In *Fogerty* v. *California*, 187 Cal. App. 3d 224, 231 Cal. Rptr. 810 (1986), *cert. denied*, 108 S. Ct. 81 (1987), the California state courts suddenly changed prior state law and held that the public had a right to certain shoreline that had previously been private property. In *Coastal Petroleum Co.* v. *American Cyanamid Co.*, 492 So.2d 339 (Fla. 1986), *cert. denied*, 107 S. Ct. 950 (1987), newly announced state law rules shifted the ownership of certain property interests from private hands to the State.

The decision below, however, is even more extraordinary. Here the lower court did not simply overturn settled law in the course of defining property rights—rights which are, after all, defined by state law in the first place. In this case the state court, by overturning settled state law, deprived a party of any means of recovering property to which it was concededly entitled. The Nevada Supreme Court confirmed that Sierra Pacific had the right to recover annualized operating expenses, *Public Service Comm'n* v. *Southwest Gas Corp.*, *supra*, but then changed state law with the effect that Sierra Pacific never had an opportunity to realize that right. The court below thus rendered the right "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards* v. *California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

As other state courts have recognized, that is going too far. *See, e.g., Ground Water Comm'n* v. *Shanks*, 658 P.2d 847, 848-849 (Colo. 1983) (change in jurisdictional requirement governing where to file application for ground water adjudication applied prospectively only); *Manly* v. *Manly*, 669 S.W.2d 537 (Ky. 1984) (new decision, overturning prior practice, that payment of filing fee is jurisdictional condition precedent to valid appeal applied prospectively only); *DeKalb County Bd. of Tax Assessors* v. *W.C. Harris & Co.*, 248 Ga. 277, 282 S.E.2d 880 (1981) (new rule of jurisdiction for tax assessment appeals applied prospectively only). This Court itself recently confirmed that claims should not be extinguished by the retroactive application of new decisions overturning settled law concerning when the claims could be brought. *St. Francis College* v. *Al-Khazraji*, 107 S. Ct. 2022, 2025-26 (1987) (new decision that two-year rather than six-year statute of limitations is applicable to be applied prospectively only).

State courts cannot manipulate federally-protected rights out of existence by changing the rules for vindicating those rights in the middle or, in this case, at the very end of the game. It is time to reaffirm this basic teaching of *Brinkerhoff-Faris* and *NAACP* v. *Alabama ex rel. Patterson*. Otherwise, state courts in this time of economic asperity will be tempted to follow the lead of Nevada and change the rules in order to protect ratepayers, state treasuries, and others—all at the expense of the single company or person whose individual rights are compromised in the process.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the Court below.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 17436

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEVADA,
Appellant,

vs.

SIERRA PACIFIC POWER COMPANY,
Respondent.

[Filed Aug. 27, 1987]

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Gunderson
GUNDERSON, C.J.

/s/ Steffen
STEFFEN, J.

/s/ Young
YOUNG, J.

/s/ Springer
SPRINGER, J.

/s/ Mowbray
MOWBRAY, J.

cc: Hon. Deborah A. Agosti, District Judge
William H. Kockenmeister
Woodburn, Wedge, Blakey & Jeppson
Judi Bailey, Clerk

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 17436

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEVADA,
Appellant,

vs.

SIERRA PACIFIC POWER COMPANY,
Respondent.

[Filed Mar. 31, 1987]

Appeal from an order requiring Public Service Commission to allow classes of expenses denied in earlier dockets. Second Judicial District Court, Washoe County; Deborah Agosti, Judge.

Reversed.

WILLIAM H. KOCKENMEISTER,
Carson City,
for Appellant.

WOODBURN, WEDGE, BLAKEY & JEPPSON and WILLIAM E. PETERSON,
Reno;
for Respondent.

OPINION

PER CURIAM:

This appeal represents the aftermath of a 1975 Public Service Commission (PSC or Commission) order which

was reversed and vacated by the district court. We thereafter affirmed the judgment of the district court on appeal. Public Serv. Comm'n v. Southwest Gas, 99 Nev. 268, 662 P.2d 624 (1983). The thrust of this appeal focuses on the asserted right of Sierra Pacific Power Company (Sierra) to recover annualized operating expenses associated with thirteen rate increases granted by the PSC during the period between April 30, 1976 and December 31, 1982. In certain instances, annualized operating expenses were not requested; in all instances there were no appeals.

In December, 1975, Sierra Pacific applied to the PSC for rate increases for its water, gas and electric departments. Included in its application for a rate increase were annualized operating expenses for insurance, depreciation and tax incurred on a new plant which had been dedicated to public use during the 1975 test year (September 1, 1974 through August 31, 1975) or which would be incurred within a certification period occurring within six months of the end of the test year.[1]

Sierra claimed these expenses were recoverable. The PSC disagreed. Sierra appealed and eventually prevailed.

In August, 1976, while case No. 36626, *Southwest Gas, supra,* was pending in district court, Sierra filed new rate increase applications, Docket Nos. 863, 864 and 865, with the PSC covering electricity, gas and water for a succeeding year. The applications were filed in the alternative. Part One of each application sought rate increases primarily attributable to the increasing cost of providing utility services after the 1975 test year. Part Two of each application sought rate increases for the

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[1] A test year is the theoretical measuring tool the PSC uses to prognosticate revenue necessary to operate a utility which seeks a rate increase for the upcoming year. The statute governing a test year in Nevada is found at NRS 704.110(3).

same types or categories of expenses which had been disallowed by the PSC in its earlier opinion: annualized depreciation, insurance and taxes which Sierra had incurred for its new plant dedicated to public service after the 1975 test year.

Upon finding that the categories of expense in Part Two of each application were the subject of pending litigation, the PSC held that it could not consider Part Two of the respective applications and dismissed the rate applications in their entirety.[2]

On April 30, 1984, approximately one year after this court effectively affirmed the district court's decision granting the challenged annualized operating expenses, *Southwest Gas, supra*, Sierra filed Advice Letters with the PSC petitioning for the annualized operating expenses which had been improperly disallowed by the PSC for Dockets 574, 575 and 576, which were the subject of the

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[2] The pertinent finding of the Commission is as follows:

> The initial issue to be determined is whether Applicant's separation of each of its applications into two parts (each having separate rate schedules) requires the Commission to consider each part separately as suggested by Applicant. We are of the opinion that each application must be considered as one inseparable application, consisting of two parts only for the purpose of attempting to satisfy the requirements of NRS 704.100 subsections 3 and 4.
>
> If Applicant did not have pending litigation in this case and the items of expense in dispute had only been considered and disallowed by the Commission, then the procedure followed by Applicant would have clearly been appropriate and within the exception set forth in NRS 704.100(3). However, in this case Applicant has elected to exercise its right of judicial review related to the Commission's disallowance of certain items of expense in Docket No. 574 et al., and thereby has clearly filed the instant applications, including the same items of expense previously disallowed, in violation of NRS 704.100(3). Under the provisions of NRS 704.100(5) the Commission must dismiss the applications designated as Docket Nos. 863, 864 and 865 in their entirety.

initial litigation. The Commission responded on September 27, 1984, with an order permitting Sierra to impose a one year surcharge on its gas and electric tariffs of $1,342,000, plus interest, to recoup the disallowed operating expenses. Later, on November 13, 1984, Sierra filed a petition for an Advisory Opinion and Declaratory Order with the PSC requesting approval of a surcharge of $14,119,855, plus carrying charges over three years. The combination of the surcharge and carrying charges totaled $17,000,000 for the annualized operating expenses assertedly incurred during the pendency of judicial review of the first challenged dockets. In its plea for relief, Sierra specified that:

> Petitioner now seeks recovery of certain expenses and related interest for the post-Docket period Nos. 574, 575 and 576 [sic] April 30, 1976, through December 31, 1982. Such expenses and calculated interest are identical in character to those covered by the Judgment in Case No. 36626 and for which recovery has now been allowed by the Commission in Docket Nos. 84-517 and 84-518. The revenue requirements including mill tax and uncollectibles and interest related to these expenses are as follows for each of Applicant's Nevada judisdictional operations:

	PRINCIPAL	INTEREST	TOTAL
Electric	$ 7,770,189	$2,475,762	$10,245,951
Gas	991,200	301,767	1,292,967
Water	1,960,918	620,019	2,580,937
Total	$10,722,307	$3,397,548	$14,119,855

Sierra contends, and the district court agreed, that the PSC must now entertain Sierra's claim for its annualized operating expenses incurred during the pendency of the original litigation. Unconvinced, the Commission seeks reversal on appeal. We have determined, despite certain misgivings, that reversal is warranted.

We turn first to the source of our misgivings, Sierra's foundation for the relief accorded it by the trial court. First, as noted above, the PSC dismissed Dockets 863, 864 and 865 since those dockets contained requests for annualized operating expenses, the same type of expenses rejected by the Commission under contested Dockets 574, 575 and 576. The PSC concluded that since the allowability of annualized operating expenses was the subject of pending litigation involving the latter dockets, NRS 704.100(3) and (5) precluded the Commission from considering any Sierra rate application that incorporated such expenses. Sierra maintained that it detrimentally relied on the PSC's ruling and thereafter omitted requests for annualized operating expenses until this court finally resolved the issue in its favor in *Southwest Gas*. Facially, Sierra's contention is compelling. The Commission, having reasonably construed the statute as prohibiting its consideration of any applications for rate increases that include items of expense generically questioned in pending litigation, ostensibly left Sierra with no alternative other than to proceed with rate increase requests that omitted expense categories under challenge in the courts. Impliedly, recovery of such expenses would be deferred until a final adjudication of their allowability. If determined to be allowable, the expenses would be recoverable; if not, Sierra would have to absorb the loss. Any contrary view would appear to subject Sierra to a manipulated loss of property without a remedy, in short, a denial of due process. The trial court so held and ordered the Commission to evaluate, calculate and allow recovery of the annualized operating expense categories that were validated in the original litigation. Moreover, the trial judge observed that since the legislature provided no right of appeal from an application dismissal by the PSC under the circumstances here present, it was apparent that eventual recovery would be allowed if the utility company prevailed in its challenge to an expense-category denial by the Commission. The court viewed any other interpre-

tation of NRS 704.100 as a deprivation of meaningful judicial review.

As previously noted, the legal symmetry of Sierra's position is difficult to resist. There are, however, a number of additional factors that must be considered in the resolution of this appeal.

The Statute

The trial court joined with Sierra in concluding that NRS 704.100(3) and (5) operated to prevent Sierra from even requesting annualized operating expenses during the pendency of litigation embracing their allowability as an issue. The district court held:

> As long as the lisputed items of expense or rate base are the subject of pending litigation, a utility is absolutely forbidden by statute from applying to the Commission to obtain any relief for such items and the Commission is forbidden by statute from even considering any such application. This prohibition continues until litigation is concluded.

The Commission, in dismissing Dockets 863, 864 and 865, reasoned at length that the statute deprived it of recurring jurisdiction to consider items of expense that previously had been disallowed by the Commission and were the subject of pending litigation. The Commission maintained that NRS 704.100(4) would not permit consideration of previously rejected items as long as they were under litigation. Indeed, the Commission concluded that it would undermine the process of judicial review if the PSC had jurisdiction to reconsider the status of previously denied expenses while the same issue was under submission to the judiciary for adjudication.

In pertinent part, NRS 704.100 reads as follows:

> 3. Except as provided in subsection 4 or in NRS 707.350, the commission shall not consider an appli-

cation by a public utility if the justification for the new schedule includes any items of expense or rate base which are set forth as justification in a pending application, are the subject of pending litigation, or have been considered and disallowed by the commission or a district court.

4. A public utility may set forth as justification for a rate increase items of expense or rate base which have been considered and disallowed by the commission, only if those items are clearly identified in the application and new facts or considerations of policy for each item are advanced in the application to justify a reversal of the commission's prior decision.

5. If the commission receives an application that is within the prohibition of subsection 3, it shall, within 30 days, notify the public utility that the application is dismissed.

We have not had occasion to interpret the referenced provisions of NRS 704.100 within the context of the instant proceeding. In *Southwest Gas Corp. v. Public Serv. Comm'n*, 92 Nev. 48, 546 P.2d 219 (1976), we did conclude that NRS 704.100(3) did not prevent the Commission from considering expense issues which were not specifically under pending litigation. *Id.* at 58-59, 546 P.2d at 226. We now conclude, contrary to the position of the parties and the trial court, that subsection 4 of NRS 704.100 will permit the Commission to reconsider its prior rulings concerning items of expense or rate base even though they are the subject of pending litigation if the involved items are clearly identified in the application and "new facts or considerations of policy for each item are advanced in the application to justify a reversal of the Commission's prior decision." Such an interpretation supplies meaning to the phrase "[e]xcept as provided in subsection 4" contained in subsection 3, and ac-

tually promotes, rather than frustrates, the prospects for an expeditious resolution of pending litigation. The PSC should be able to consider new facts and policy variations that could resolve pending litigation. Moreover, in reconsidering prior determinations, litigation may be avoided when new facts and policy considerations make it apparent that a change of PSC policy is in order. Absent such an interpretation of the statute, ratepayers could be burdened with unanticipated surcharges many years down the road.

Notwithstanding the Commission's interpretation of the statute and Sierra's apparent acquiescence therein, both parties deviated therefrom in their future conduct. Subsequent to the dismissal of Dockets 863, 864 and 865 and during the pendency of the litigation, 1976-82, Sierra submitted several applications that included annualized operating expense as justification for the requested rate increase.[3] Moreover, in selected instances the PSC granted such requests;[4] in no instance was the entire application dismissed. Furthermore, Sierra attended rulemaking proceedings before the Commission. These culminated in a Commission regulation, promulgated September 27, 1982, allowing annualized operating expenses and revenues.[5]

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[3] a. Docket Nos. 2856, 2857 and 2858, decided October 29, 1980, wherein Sierra requested certain annualized expenses.

b. Docket No. 81-660, decided May 3, 1982, wherein Sierra requested, and received, annualized operating expenses.

c. General Order No. 3, Rule 16, effective January 1, 1979, wherein annualized operating expenses were considered in a rulemaking proceeding in which Sierra was a party.

d. Docket Nos. 82-266 and 82-369, decided September 27, 1982, a rulemaking proceeding in which Sierra was a party and which, by Commission regulation, allowed annualized operating expenses and revenues.

[4] Docket No. 81-660, decided May 3, 1982.

[5] Docket Nos. 82-266 and 82-369, decided September 27, 1982.

Properly or improperly, the only time that the PSC adhered to its position that NRS 704.100(3) and (5) was a jurisdictional bar to consideration of items at issue in pending litigation was in connection with the dismissed dockets. It thus appears that, in fact, both Sierra and the PSC tacitly disregarded the rigid position taken by the Commission in its order dismissing Dockets 863, 864 and 865. Nevertheless, since Sierra's recovery of annualized operating expenses, omitted or deleted from the thirteen dockets at issue, was undoubtedly prejudiced by the Commission's formal position concerning the dictates of NRS 704.100(3) and (5), we would have little difficulty affirming the judgment of the trial court if our ruling impacted solely on the PSC. Unfortunately, as will be shown, the ultimate burden of such a decision would be borne in large measure by innocent third parties who never benefited from Sierra's services.

Equitable Considerations

The uncompensated annualized expenses at issue in this appeal were accrued from 1976 to 1982. If this court affirmed the decision below, many ratepayers who would pay the resulting surcharge would not have been consumers of Sierra's power during the relevant time period.[6] Thus, many non-users would be forced to subsidize the loss which would otherwise fall upon Sierra. Of course, the Commission must have realized the potential for such an eventuality when it, in effect, told Sierra it would have to delay attempts to recover its annualized

[6] In 1977, Sierra Pacific Power served 109,167 customers in Nevada. *Sierra Pacific Power, FERC Form #1: Annual Report of Major Electric Utilities, Licensees and Others* (1977). In 1985, Sierra Pacific served 155,010 customers in Nevada. *Sierra Pacific Power, FERC Form #1: Annual Report of Major Electric Utilities, Licensees and Others* (1985). This is a 42% increase in the number of consumers during an eight year period. This percentage will grow significantly by the time the proposed surcharge could have been exacted.

operating expenses until after the process of judicial review had run its course. If Sierra had remained content to rely on the rigid PSC pronouncement, and if the Commission had consistently adhered thereto, we would be faced with a somewhat different perspective in equity. Unfortunately, both the PSC and Sierra vacillated on the subject to the point where it is not difficult to weigh the equities between Sierra and the uninvolved but potentially burdened consumers.

Since Sierra continued to supplicate the PSC for annualized operating expenses on a selective basis during the period of litigation, and since the PSC entertained such applications without dismissal, it is apparent that Sierra could have applied for such expenses in each of the contested thirteen dockets and appealed from any denial by the PSC. In so doing, Sierra would have provided notice that it ultimately intended to recover its rejected expenses through means of a surcharge. At least the eonsuming public would have been technically apprised of Sierra's intent to impose an eventual surcharge on its customers.

We also view as significant the failure of Sierra to seek review of the Commission's preclusive interpretation of NRS 704.100. Apparently content with the Commission's position, Sierra waited a period of years before seeking recovery of an increasingly large accrual of annualized expenses. In doing so, it assumed the risk that the Commission's interpretation would not survive the scrutiny of this court.

The Commission contends that the equitable doctrine of laches applies to Sierra's belated pursuit of the annualized expenses accruing throughout the period of litigation. We are constrained to agree. Laches will be invoked when an actual or presumable change of circumstances makes it inequitable to grant relief. Miller v. Walser, 42 Nev. 497, 517, 181 P. 437, 443 (1919). In Cooney v. Pedroli, 49 Nev. 55, 62-63, 235 P. 637, 640

(1925), we declared that "[w]henever the passage of time has brought in its train anything that works to the disadvantage of a party and makes it doubtful if equity can be done, relief will be denied." The history of the instant claim reveals significant inaction on the part of Sierra. The surcharge for annualized expenses approved by the district court had its genesis in a 1975 Commission decision. That decision was overturned in district court on April 11, 1979 and we affirmed the court's judgment in April, 1983. Sierra filed its new surcharge request with the PSC in November, 1984, six and one-half years after the first district court decision and twenty months after this court's affirmation. As previously noted, Sierra requested, and on occasion received, annualized operating expenses during the pendency of this litigation, yet did not appeal the denial of such expenses. Nor did it take any measures to give notice of its intent to recover annualized expenses which were never presented to the PSC for consideration.

Sierra opposes the imposition of laches on grounds that the doctrine may not be invoked if there has been an impediment to prosecuting a claim. Lubin v. Lubin, 302 P.2d 49, 59 (Cal. Ct. App. 1956); Secret Valley Land Co. v. Perry, 202 P. 449 (Cal. 1921). As discussed above, NRS 704.100, as interpreted by the PSC, was initially and at least ostensibly an impediment to Sierra's claim of entitlement to annualized operating expenses. In practical effect, however, neither the statute nor the PSC precluded Sierra from requesting such expenses in docket submissions subesequent to Dockets 863, 864 and 865. The PSC in fact permitted Sierra to make such requests without dismissing Sierra's rate applications.

If this court were to affirm Sierra's entitlement to the surcharge, large numbers of consumers who never benefited from the lower-priced power would be forced to pay for it. Moreover, many who did benefit have undoubtedly relocated outside the area affected by the surcharge, thus

avoiding their fair share of the assessment. It is apparent, therefore, that substantial prejudice and inequity would result from an imposition of the surcharge.

If Sierra had proceeded with diligence to challenge the Commission's interpretation of the statute or, at the least, had recognized and acted upon the Commission's relaxed approach to its earlier pronouncement, we are confident that much of the delay and prejudice could have been avoided or minimized. In any event, such diligence would have alerted consumers and consumers' groups that Sierra would be seeking recovery of a known amount of expenses that had been rejected by the PSC. Since it failed to do so, we hold that Sierra's right to recovery by means of a surcharge is barred by laches.

Retroactive Ratemaking

Our disposition on the issue of laches makes it unnecessary to address the issue of whether an allowance of the surcharge would constitute unlawful retroactive ratemaking. We do note, however, that if NRS 704.100 had prevented Sierra from seeking its annualized operating expenses during the pendency of litigation, Sierra's entitlement to recover at the successful conclusion of judicial review would have been clear. To conclude otherwise would be tantamount to a taking of property without due process of law.

Conclusion

For reasons stated above, we reverse the judgment of the district court and direct the entry of judgment on behalf of the PSC in accordance with this opinion.

/s/ Gunderson
GUNDERSON, C.J.

/s/ Steffen
STEFFEN, J.

/s/ Young
YOUNG, J.

/s/ Springer
SPRINGER, J.

/c/ Mowbray
MOWRBAY, J.

Attest: A full, true and Correct Copy.
Judith Fountain, Clerk of the Supreme Court

By /s/ J. Richards
J. RICHARDS
Chief Deputy

APPENDIX C

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

No. 85-7247

Department No. 3

SIERRA PACIFIC POWER COMPANY,
a Nevada corporation,
Plaintiff,

v.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEVADA; THE OFFICE OF ADVOCATE FOR CUSTOMERS OF PUBLIC UTILITIES; THE UTILITY SHAREHOLDERS ASSOCIATION OF NEVADA, a Nevada corporation; *et al.*,
Defendants and interested parties.

[Filed Mar. 25, 1986]

ORDER

The above-entitled matter comes before the Court on the Plaintiff's Petition and Complaint for Judicial Review, Mandamus and for Declaratory Relief. Essentially, this is an appeal from a determination made by the Public Service Commission of the State of Nevada. The matter came on for hearing on February 20, 1986, at which time Plaintiff was present and represented by counsel William Peterson, James Salo and John Madariaga. Defendant Office of Advocate for Customers of Public Utilities was represented by Kelly Jackson and Jon Wellinghoff. The Public Service Commission of the State of

Nevada was represented by William Kockenmeister. The Utility Shareholders Association of Nevada was represented by Steven Tackes and Robert L. Crowell.

Certain exhibits were marked and admitted into evidence and the matter was argued by counsel. The matter was subsequently submitted and counsel were ordered to file further points and authorities.

The Post-Trial Brief of the Attorney General's Office of Advocate for Customers of Public Utilities was filed on February 28, 1986. On March 4, 1986, the Attorney General's Office filed a subsequent Erratum to the previously-filed Post-Trial Brief. On March 7, 1986, Plaintiff filed its Reply Brief to the Attorney General's Post-Trial Brief.

The Court, having considered the arguments of counsel and the authorities relied thereon by counsel, finds and concludes that the position of Sierra Pacific Power Company, the Plaintiff in the above-entitled action, is well taken in all respects.

The facts which give rise to this appeal are undisputed.

On December 1, 1975, Sierra Pacific Power Company, the Plaintiff herein, filed applications for general rate increases for furnishing electricity, gas and water to its customers. These applications were filed with the Nevada Public Service Commission and are reflected in Docket Numbers 574, 575 and 576. The applications were partially approved by the Commission, which refused to include in the rates expenses incurred during the 1975 test year for depreciation, taxes and insurance attributable to a new plant dedicated to public use by Sierra Pacific.

On June 16, 1976, Sierra Pacific Power Company filed a Petition seeking judicial review of that Order in the First Judicial District Court of Nevada. That Petition sought to vacate the Commission's Order in part and to require the Commission to permit Sierra Pacific to recover increased rates to reflect the disallowed expenses for the 1975 test year.

While Sierra Pacific's Petition for Review was pending in the First Judicial District, Sierra Pacific Power Company filed on August 18, 1976, new rate-increase applications with the Public Service Commission for furnishing electricity, gas and water to its customers for the succeeding test year. These were Docket Numbers 863, 864 and 865. Each application was filed in two parts. Part One sought rate increases primarily based upon the increase in cost of providing utility services and part two of each application sought rate increases for the same types or categories of expenses previously disallowed by the Public Service Commission, which was the subject of Sierra Pacific Power Company's pending Petition in the First Judicial District Court, but which Sierra Pacific had incurred after the 1975 test year.

The Public Service Commission dismissed these rate applications in their entirety, holding that it could not consider Part Two of each application. These dismissals were pursuant to NRS 704.100 which precludes a utility from filing and prohibits the Public Service Commission from considering any rate application which includes as justification expenses which are the subject of pending litigation.

On October 10, 1978, the Public Service Commission issued an order adopting a Revised General Order 3, which became effective on January 1, 1979. The Revised General Order 3 included Rule 16.100, which purported to interpret and implement the provisions of NRS 704.110(3). Rule 16.100 was substantially identical to the interpretation of NRS 704.110(3), which the Commission had included as Schedule 1 to its Opinion and Order in Dockets 574, 575 and 576 and which, at the time of the adoption of Revised General Order 3, was still the subject of an appeal.

On April 11, 1979, the First Judicial District Court of Nevada issued its decision on Sierra Pacific's Petition and

found that the Commission had wrongfully disallowed expenses for depreciation, taxes and insurance incurred during the 1975 test year. The judgment vacated the Commission order in part and directed Sierra Pacific to file with the Commission rate schedules imposing a surcharge designed to recover increased rates based on $1,342,000 (One-Million Three-Hundred-Forty-Two-Thousand Dollars) in such expenses incurred by Sierra Pacific during the 1975 test year.

This decision was appealed by the Public Service Commission to the Nevada Supreme Court. The Nevada Supreme Court issued its Opinion affirming the District Court decision in all respects on April 21, 1983.

Thereafter Sierra Pacific filed rate schedules imposing a surcharge designed to recover $1,342,000 in wrongfully disallowed expenses. The Commission granted the requested relief in its Opinion and Order in Docket Numbers 84-518 and 84-517, which were not filed until September 27, 1984.

On November 13, 1984, Sierra Pacific filed a Petition for Advisory Opinion and Declaratory Order in Docket Number 84-1120. That Petition set forth the amount of expenses which Sierra Pacific Power Company asserted were wrongfully denied for docket filings subsequent to Dockets 574, 575 and 576, and which could not have been claimed by Sierra Pacific or considered by the Commission until the litigation involving Dockets 574, 575 and 576 was concluded.

The Petition in Docket Number 84-1120 proposed appropriate surcharges and requested instructions from the Commission as to how the amount would be recovered.

On June 3, 1985, the Commission orally denied the Petition.

NRS 704.100(3) provides that the Commission may not consider an application by a public utility if the justifi-

cation for the new schedule includes any items of expense or rate base which are the subject of pending litigation. If this occurs, the Commission must notify the public utility that the application is dismissed. The Public Service Commission correctly determined that classes of expenses sought by Sierra Pacific Power Company in Docket Numbers 863, 864 and 865 were the subject of pending litigation in the First Judicial District Court, even though the expenses in question were incurred in a subsequent test year. Accordingly, the Commission dismissed the applications in their entirety, taking the position that the prohibitions set forth in NRS 704.100(3)(5) were absolute and mandatory. As long as the disputed items of expense or rate base are the subject of pending litigation, a utility is absolutely forbidden by statute from applying to the Commission to obtain any relief for such items and the Commission is forbidden by statute from even considering any such application. This prohibition continues until litigation is concluded.

NRS 704.100 was intended to restrict the permissible frequency and degree of repetition in application for changes of rates. Yet it cannot be imagined that the legislature intended that utilities should be barred from all relief for all later-incurred expenses simply because they are of the same nature as expense items which are the subject of a judicial dispute. The legislature could only have intended that the Public Service Commission have the authority to order relief upon termination of the litigation for these later-incurred expense items.

That the legislature did intend NRS 704.100 to operate to merely defer the collection of wrongfully-withheld revenues or expenses pending final judicial outcome, rather than eliminate all right to their recovery, is manifested by the legislature's failure to provide for any right of appeal from the dismissal of an application on the ground that includes classes or categories of expense which are the subject of pending litigation in violation of NRS

704.100. Prior to 1983, NRS 704.540, which provides for judicial review from Commission orders, limited the utility's appeal right to orders of the Commission "fixing any rate, fare or charge." NRS 704.100(3) further provides that in the event the litigation establishes that certain items of expense are not recoverable, the Commission is absolutely precluded from considering any post-litigation application which includes such items. The legislature must have intended that in the event the litigation establishes their allowability, the disputed expenses may be recovered by the utility. Any other interpretation would render the right to judicial review completely illusory.

In addition, any interpretation of the statute which would result in barring a utility from recovering such expenses would offend the constitutional provision of due process. The effect of such a role would be to deny to the utility its constitutional right to earn a fair and reasonable rate of return on property dedicated to public use in violation of the utility's Fourteenth Amendment right not to be deprived of property without due process of law. Moreover, such a construction would deprive the utility of any right to a hearing as well as the right to effective judicial review.

The opponents of the Petition also argue that the relief prayed for in the Petition may not be granted because it would amount to retroactive rate making. The fixing of surcharges to recover wrongfully-disallowed expenses for Dockets subsequent to 574, 575 and 576 does not necessitate recalculation or establishment of a new or different rate of return, rate base, or rate spread, or any analysis into any of the other host of variables which are involved in a true rate-making proceeding. A simple recalculation of the proper revenue requirement to recover the wrongfully-disallowed expenses is determined by the order of the First Judicial District Court, and does not invoke or involve the Commission's rate-making function. Even if recalculation of wrongfully-denied expenses

involves the Commission's legislative rate-making function, the policy against retroactive rate making does not and cannot operate to limit or restrict judicial power. The general policy disfavoring retroactive ratemaking cannot be utilized to limit or restrict the judicial power in ordering and fashioning appropriate relief to correct error on the part of the Commission. Any such limitation would constitute an unlawful and unconstitutional encroachment on the judicial power of the State. Application of the policy against retroactive rate making to limit the relief available under the judicial review statute would effectively "legislate away" the power of the judiciary to review and grant effective and meaningful relief from error (even constitutional error) committed by the Commission. Finally, the Attorney General's Office of Advocate for Customers of Public Utilities contends that should the Court adopt the reasoning of the Petitioner and allow it to recover expenses which were the subject of litigation, that Sierra Pacific Power Company is only entitled to recover expenses through December, 1978, because on January 1, 1979, the Public Service Commission adopted a regulation identical to the one being challenged in that litigation (Schedule 1) which the First Judicial District Court ultimately struck down as unlawful and contrary to the requirements of the governing statute, NRS 704.110. This argument is without merit. The First Judicial District Court determined that Sierra Pacific was entitled to annualized expenses under NRS 704.100. This result was affirmed by the Nevada Supreme Court. The Statutes of Nevada required that Sierra Pacific defer making any claim for those expenses until it prevailed in that litigation. Now that it has prevailed, it is asserted that Sierra Pacific Power Company has forfeited its right to recover this expense because it failed to initiate a second challenge to the Commission's interpretation (Rule 16.100).

Sierra Pacific Power Company could not have initiated any challenge since it had no right to even claim the

expenses during the period of litigation and the Commission had no power to consider such a claim. It appears that the First Judicial District Court decided substantively in favor of the Sierra Pacific Power Company on the issue of the expenses which Sierra Pacific claimed it was entitled to under the statute. The Supreme Court affirmed that decision.

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that the above-entitled matter be, and hereby is, remanded to the Public Service Commission and that the Public Service Commission is directed to review, evaluate, calculate and allow the classes of expenses which were wrongfully denied in the Dockets which were filed subsequent to Dockets 574, 575 and 576, and which could not previously have been claimed by Sierra Pacific or considered by the Commission prior to the Supreme Court's decision of April 21, 1983.

DATED this 25 day of March, 1986.

/s/ [Illegible]
District Judge

APPENDIX D

BEFORE THE
PUBLIC SERVICE COMMISSION OF NEVADA

Docket No. 84-1120

SIERRA PACIFIC POWER COMPANY

Petition for an Advisory Opinion and Declaratory Order seeking recovery of certain expenses and related interest for the post-Docket period No. 574, 575 and 576, April 30, 1976 through December 31, 1982.

TRANSCRIPT OF PROCEEDINGS

AGENDA MEETING

June 3, 1985

Carson City, Nevada

---

[2] APPEARANCES

Commission Members Present:

SCOTT CRAIGIE, Chairman
FRED SCHMIDT, Commissioner
CHRISTINE BOGGS, Commissioner
STEPHEN WIEL, Commissioner
TOM STEPHENS, Commissioner

WILLIAM KOCKENMEISTER
Legal Counsel
Public Service Commission
505 East King Street
Carson City, Nevada

[3] CARSON CITY, NEVADA,

Monday, June 3, 1985, 1:50 p.m.

MR. KOCKENMEISTER: Item No. 2 is a petition by Sierra Pacific Power Company for an advisory opinion and declaratory order seeking recovery of certain expenses and related interest for the post-Docket period No. 574, 575 and 576, which is April 30, 1976 through December 31, 1982.

This is Docket Number 84-1120 and it was filed on November 13, 1984.

It's a confusing factual scenario and I'll try to be as brief as possible.

The substance of Sierra Pacific's position relates to the Commission's decision in Docket Numbers 574, 575 and 576, that's the infamous Judge Smart case.

As the Commission is aware, the District Court reversed the Commission on those dockets and that reversal was ultimately affirmed by the Nevada Supreme Court.

As part of the reversal, the Commission was required to implement a surcharge for recovery of certain related—certain expense items which the court found that Sierra should have been permitted to recover.

Sierra now has filed this docket and they are now seeking recovery of those same expense items for that period April 1976 through December 31, 1982. Those expense [4] items refer to, I think it was approximately thirteen rate cases that were filed during that time period and which, as I said, relate to expenses that were disallowed by the Commission and overturned by the courts in Dockets No. 574, 575 and 576.

Sierra filed with their petition a table showing the total amounts which they allege are due. It includes principal and interest and it includes their electric, gas

and water departments and total sum of fourteen plus million dollars that they request that the Commission issue an advisory opinion allowing them to recover.

They have received comments in support by the Shareholders' Association. The shareholders agree with the petition with one exception, and they state that Sierra calculated their rate of return on both the principal amount and interest amount, and the shareholders submit that, while both an interest and a rate of return calculation are appropriate, that the rate of return should be only applied to the principal amount requested and not to both principal and interest.

We received opposition from the Commission staff and from the OCA.

The OCA's opposition is essentially twofold. First, they allege that Sierra is estopped, equitably [5] estopped from pursuing retroactive relief where the judicial order required the utility to act within a designated period of time and where Sierra failed to act.

The second grounds for opposition on the part of the OCA is that the request is, in essence, a request for retroactive rate making, which is prohibited in Nevada and most other jurisdictions.

Staff's opposition was based on the argument that the request is also retroactive rate making. My recommendation is that the Commission take no action on this petition for an advisory opinion and would be deemed denied by operation of law, and my reasoning is essentially threefold.

Sierra pointed out that the Commission's decisions dismissing the rate case was subsequent to the Judge Smart rate case, and the reason why the Commission dismissed that application was because they included items of expense or rate base which were included in Docket Numbers 574 and 575 and 576, and those dockets, the appeals were still pending.

The Commission had no choice, pursuant to Statute, to dismiss the subsequent rate case.

At that time, if Sierra felt that it was harmed, at the time the Commission dismissed Dockets 863, 864 and 865, they should have appealed that decision. They [6] didn't.

Here we are, I guess it's eight or nine years later and they want you to start recalculating items of expense that were [a]llegedly disallowed back in those years.

My second reason is that, in the Judge Smart case, the court ordered refunds based on the alleged under-recovery of revenues as a result of the Commission's decisions in Dockets Numbers 574, 575 and 576. Those refunds were not based on any alleged under-recoveries in a docket subsequent to that time period. That judicial decision only relates to Dockets 574, 575 and 576.

As I've said, if they felt that they were entitled to recovery in the subsequent dockets, they should have appealed those dockets at that time. Those are final decisions of the Commission and I don't believe the Commission has jurisdiction to go back, even if it wanted to, at this time, to go back to those thirteen previous dockets and order a surcharge for alleged under-recovery of expenses.

And lastly, even if we had jurisdiction, I agree with the arguments of the OCA and the staff that it's retroactive rate making.

The reason why Docket Numbers 574, 575 and 576 were not considered to be retroactive rate making is the court found the Commission's Order to be void in those [7] dockets. Therefore, it's not retroactive to go back and make an adjustment. In these dockets that they now want an adjustment, they are final, unappealed decisions of the Commission, and that's a distinct difference.

In these cases, to go back and order a surcharge to recover under-recovery in those dockets, I believe, is a

classic case of retroactive rate making which is prohibited in this state.

And so for those reasons, it would be my recommendation not to take action on the petition.

CHAIRMAN CRAIGIE: I believe at this time if we were to take Mr. Kockenmeister's recommendation, we would be entertaining no motions and we would move to Item No. 3.

Before I suggest we do that, if there are questions or comments that people wish to make, this would be the appropriate time.

COMMISSIONER WEIL: I personally think that would be an appropriate thing to do. I think this is a matter for the courts.

COMMISSIONER SCHMIDT: I guess I just wanted to ask one question.

In your memo, you indicate that, to your knowledge, you don't know whether they appealed 863, 864 and 865?

Have you found out whether—

[8] MR. KOCKENMEISTER: I haven't found out. I believe that to be true, that that decision was not appealed. I don't have any records, and I haven't had a chance to check the court files, but I don't have any record of any appeal on those dockets.

Perhaps Sierra can enlighten us here today, but I don't believe the appeals were taken.

CHAIRMAN CRAIGIE: At this point, then, unless somebody wishes to rise for the motion, I suggest we move to Item No. 3.

And we will do just that.

No. 87-853

Supreme Court, U.S.
FILED
JAN 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SIERRA PACIFIC POWER COMPANY,
Petitioner,

v.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEVADA,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM H. KOCKENMEISTER
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QUESTIONS PRESENTED

1. Is it appropriate to grant Certiorari to review a decision of a state court based on an issue of state law?

2. Is the requirement for notice and opportunity to be heard on an issue satisfied when that issue is fully briefed by the parties and discussed at oral argument?

PARTIES TO THE PROCEEDINGS

Petitioner has correctly set forth the parties to the proceeding.

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IN THE
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Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

Respondent The Public Service Commission of Nevada (Commission) respectfully prays that the petition for writ of certiorari to review the judgment and opinion of the Nevada Supreme Court entered in the above-entitled proceeding on March 31, 1987, be denied.

OPINIONS BELOW

Petitioner Sierra Pacific Power Company has correctly set forth the appropriate judgments and opinions below.

JURISDICTION

The Commission opposes exercise of this Court's jurisdiction pursuant to 28 U.S.C. § 1257(3).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commission does not object to Petitioner's citation to the Fourteenth Amendment to the United States Constitution. However, Nevada Revised Statutes § 704.100, cited by Petitioner, was amended by the 1987 Nevada Legislature. Nev. Rev. Stat. §§ 704.100(3) and (5), as set forth by Petitioner, were repealed. Thus, those sections of the Statutes Petitioner alleges precluded it from requesting recovery of annualized operating expenses are no longer in force and effect.

STATEMENT OF THE CASE

The genesis of this litigation is the Commission's decision on rate increase applications issued over 11 years ago on May 28, 1976 (Docket Nos. 574, 575, 576). The Commission authorized increases for Petitioner's electric, gas and water operations in Nevada but denied Petitioner's request to "annualize" certain operating expenses. Annualization is an accounting methodology utilized by some ratemaking agencies to project operating expenses for a 12-month period even

though such expenses were not actually experienced for a full test year.

Petitioner appealed the Commission's denial of recovery of annualized operating expenses. On April 11, 1979, the District court reversed the Commission, holding that Petitioner was entitled to recover annualized operating expenses.[1] The Commission appealed the District Court decision. The Nevada Supreme Court affirmed the decision of the District Court. Public Service Comm'n v. Southwest Gas Corp., 99 Nev. 268, 662 P.2d 624 (1983).

On April 30, 1984, approximately one year after Public Service Comm'n v. Southwest Gas, supra, Petitioner filed a petition with the Commission requesting recovery of annualized operating expenses for Docket Nos. 574, 575 and 576. On September 27, 1984, the Commission permitted Petitioner to impose a one year surcharge of $1,342,000, plus interest, on Petitioner's electric and gas tariffs to recoup the disallowed annualized operating expenses associated with Docket Nos. 574, 575 and 576.

On November 13, 1984, Petitioner filed an additional surcharge request of $14,119,855 plus

[1] Case No. 36626 (1st Dist. Ct., April 11, 1979).

carrying charges of approximately $3 million. This additional surcharge was intended to recover annualized operating expenses allegedly incurred as part of 13 unappealed rate cases decided between 1976 and 1982 while the appeal of Docket Nos. 574, 575 and 576 was pending.

As set forth by Petitioner in its Statement of the Case, the Commission denied the additional surcharge, the District Court reversed the Commission and the Nevada Supreme Court reversed the District Court, holding that Petitioner was not entitled to recover the additional surcharge. Public Service Comm'n v. Sierra Pacific Power Co., ___ Nev. ___, 734 P.2d 1245 (1987).

The Nevada Supreme Court's decision to deny relief was based on a detailed review of the complex factual history associated with the additional surcharge request. Upon such a review of the facts, the Court concluded, based on an analysis of pertinent state law, it was appropriate to invoke laches to bar relief.

REASONS FOR NOT GRANTING THE WRIT

1. The Nevada Supreme Court's Decision Was Based On An Issue Of State Law

The decision to deny the additional surcharge was based on the imposition of the equitable

doctrine of laches. As set forth by the Nevada Supreme Court:

> The Commission contends that the equitable doctrine of laches applies to Sierra's belated pursuit of the annualized expenses accruing throughout the period of litigation. We are constrained to agree. Laches will be invoked when an actual or presumable change of circumstances makes it inequitable to grant relief. Miller v. Walser, 42 Nev. 497, 517, 181 P. 437, 443 (1919). In Cooney v. Pedroli, 49 Nev. 55, 62-63, 235 P. 637, 640 (1925), we declared that "[w]henever the passage of time has brought in its train anything that works to the disadvantage of a party and makes it doubtful if equity can be done, relief will be denied." The history of the instant claim reveals significant inaction on the part of Sierra. The surcharge for annualized expenses approved by the district court had its genesis in a 1975 Commission decision. That decision was overturned in district court on April 11, 1979 and we affirmed the court's judgment in April, 1983. Sierra filed its new surcharge request with the PSC in November, 1984, six and one-half years after the first district court decision and twenty months after this court's affirmation. As previously noted, Sierra requested, and on occasion received, annualized operating expenses during the pendency of this litigation, yet did not appeal the denial of such expenses. Nor did it take any measures to give notice of its intent to recover annualized expenses which were never

presented to the PSC for consideration. Petition For Writ of Certiorari, App. 11a-12a.

It is settled law: a state court decision that relief was barred by laches will not be reviewed by this Court. Utley v. St. Petersburg, 292 U.S. 106, 111 (1934); Wood v. Chesborough, 228 U.S. 672, 677 (1913); Preston v. City of Chicago, 226 U.S. 447, 450 (1913).

The rationale behind this rule of law is that "[a] person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a federal one." Pierce v. Somerset Railway, 171 U.S. 641, 648 (1898).

2. The Decision To Invoke The Doctrine Of Laches Was Based On A Detailed Analysis Of The Facts

Petitioner alleges that Nev. Rev. Stat. § 704.100[2], as interpreted by the Commission in 1976 in Docket Nos. 863, 864 and 865, absolutely precluded Petitioner from even requesting recovery of annualized operating expenses while the appeal of Docket Nos. 574, 575 and 576 was pending. Once

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[2] As set forth supra, at 2, Nevada Revised Statutes § 704.100 was amended in 1987.

the appeal concluded in Petitioner's favor, Petitioner alleges it was entitled to recover annualized operating expenses for the period 1976-1982. According to Petitioner, denial of the additional surcharge is a deprivation of property in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The Nevada Supreme Court scrutinized Petitioner's due process arguments and concluded, based on a review of the facts, that laches should bar relief. This Court has held that "[w]e do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925). Moreover, these specific facts are not likely to recur due to the amendment of Nev. Rev. Stat. § 704.100.

The gravamen of Petitioner's request for relief was based on its assertion that it was absolutely precluded from requesting recovery of annualized operating expenses while the appeal of Docket Nos. 574, 575 and 576 was pending. Upon review of the facts, however, the Court correctly concluded that Petitioner did seek recovery of annualized operating expenses during the period in question:

> Notwithstanding the Commission's interpretation of the statute and Sierra's apparent acquiescence therein, both parties deviated therefrom in their future conduct. Subsequent to the dismissal of Dockets 863, 864 and 865 and during the pendency of the litigation, 1976-82, Sierra submitted several applications that included annualized operating expense as justification for the requested rate increase. Moreover, in selected instances the PSC granted such requests; in no instance was the entire application dismissed. Furthermore, Sierra attended rulemaking proceedings before the Commission. These culminated in a Commission regulation, promulgated September 27, 1982, allowing annualized operating expenses and revenues. Petition For Writ of Certiorari, App. 9a (footnotes omitted).

The Court's decision to deny relief was also based in part on Petitioner's failure to even give notice that it sought to impose an additional surcharge:

> Since Sierra continued to supplicate the PSC for annualized operating expenses on a selective basis during the period of litigation, and since the PSC entertained such applications without dismissal, it is apparent that Sierra could have applied for such expenses in each of the contested thirteen dockets and appealed from any denial by the PSC. In so doing, Sierra would have provided notice that it ultimately intended to recover its rejected expenses through means of a

> surcharge. At least the consuming public would have been technically apprised of Sierra's intent to impose an eventual surcharge on its customers. Petition For Writ of Certiorari, App. 11a.

Lastly, the Court found Petitioner's failure to challenge the Commission's interpretation of Nev. Rev. Stat. § 704.100, as set forth in Docket Nos. 863, 864 and 865, to be compelling:

> We also view as significant the failure of Sierra to seek review of the Commission's preclusive interpretation of NRS 704.100. Apparently content with the Commission's position, Sierra waited a period of years before seeking recovery of an increasingly large accrual of annualized expenses. In doing so, it assumed the risk that the Commission's interpretation would not survive the scrutiny of this court. Petition For Writ of Certiorari, App. 11a.

Petitioner asserts that it was precluded from challenging the Commission's interpretation of Nev. Rev. Stat. § 704.100. Petitioner cites Southwest Gas Corp. v. Public Service Comm'n, 92 Nev. 48, 546 P.2d 219 (1976) for the proposition that there was no right to appeal a dismissal of a rate increase application pursuant to Nev. Rev. Stat. § 704.100(5). Petitioner has simply ignored the crucial holding in this case.

In Southwest Gas Corp. v. Public Service Comm'n, supra, the utility filed a petition for a writ of mandamus, requesting that the Nevada Supreme Court require the Commission to reinstate a rate increase application dismissed pursuant to Nev. Rev. Stat. § 704.100(5). The Court held that because there was no right to appeal such a dismissal, the utility had no plain, speedy and adequate remedy in the ordinary course of law, and that mandamus was, therefore, appropriate. 92 Nev. at 56.

Obviously, Petitioner could have filed a petition for a writ of mandamus, challenging the Commission's dismissal of Docket Nos. 863, 864 and 865. However, Petitioner failed to seek a writ of mandamus, relying instead on its own interpretation of the effect of Nev. Rev. Stat. § 704.100. By failing to preserve its right to appeal, Petitioner simply assumed the risk that the ultimate interpretation by the Nevada Supreme Court would differ from its own. Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673, 682, fn. 9 (1930). The point is Petitioner did not take this issue to the Nevada Supreme Court until it was too late.

3. The Nevada Supreme Court Did Not Retroactively Overturn Settled State Law

Petitioner asserts the Nevada Supreme Court overturned a settled interpretation of state law, thereby denying Petitioner its constitutionally protected right to recover annualized operating expenses. Petitioner's assertion is based on an incorrect analysis of Southwest Gas v. Public Service Comm'n, supra.

In that case, the utility filed a Petition For Writ of Mandamus, requesting the Court reinstate a rate increase application dismissed by the Commission pursuant to Nev. Rev. Stat. § 704.100. The writ was issued, the Court holding that even though the application contained items previously disallowed by the Commission, new policy considerations were advanced to warrant reinstatement. The Court specifically found there was no pending litigation containing items of expense previously disallowed. 92 Nev. at 60.

Thus, the issue of whether a utility can apply for previously disallowed items that are the subject of pending litigation was not before the Court in Southwest Gas v. Public Service Comm'n, supra. In the case at bar, the Nevada Supreme Court correctly concluded that this issue was one of first impression:

> We have not had occasion to interpret the referenced provisions of NRS 704.100 within the context of the instant proceeding. In Southwest Gas Corp. v. Public Serv. Comm'n, 92 Nev. 48, 546 P.2d 219 (1976), we did conclude that NRS 704.100(3) did not prevent the Commission from considering expense issues which were not specifically under pending litigation. Id. at 58-59, 546 P.2d at 226. We now conclude, contrary to the position of the parties and the trial court, that subsection 4 of NRS 704.100 will permit the Commission to reconsider its prior rulings concerning items of expense or rate base even though they are the subject of pending litigation if the involved items are clearly identified in the application and "new facts or considerations of policy for each item are advanced in the application to justify a reversal of the Commission's prior decision." Petition For Writ of Certiorari, App. 8a.

Settled state law was not retroactively overturned. In Southwest Gas v. Public Service Comm'n, supra, the Court held that a utility could request items of expense that had been previously disallowed by the Commission. The issue of whether pending litigation would prohibit recovery of disallowed expenses was simply not before the Court since there was no pending litigation. In the case at bar, the Court held, consistent with Southwest Gas v. Public Service Comm'n, supra,

that a utility could request recovery of previously disallowed items regardless of whether they were subject to pending litigation. Therefore, those cases cited by Petitioner wherein settled state law was retroactively overturned are not relevant.

4. The Nevada Supreme Court Did Not Deprive Petitioner Of Notice And Opportunity To Be Heard

Petitioner alleges the Nevada Supreme Court concluded that Petitioner had requested annualized operating expenses without affording it notice and opportunity to be heard. Throughout the proceeding before the Nevada Supreme Court the Commission asserted that Petitioner had requested annualized operating expenses. This issue was addressed in the Commission's Motion For Stay of the District Court Order, and in the Opening and Reply Briefs. Moreover, the documents relied on by the Court for its factual determination that Petitioner had requested annualized operating expenses were either prepared by Petitioner or were orders drafted by the Commission as a result of fully litigated proceedings for rate increases filed by Petitioner. All of these documents were attached as exhibits to the Commission's appellate briefs. Furthermore, Petitioner responded to the

Commission's assertions in its Answering Brief and during oral argument. Petitioner's argument that it was not afforded notice and opportunity to be heard is without merit.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the writ be denied.

Respectfully submitted,

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On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-853

SIERRA PACIFIC POWER COMPANY,
Petitioner,

v.

THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEVADA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada

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REPLY BRIEF FOR PETITIONER

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1. Respondent Public Service Commission argues that this Court should deny certiorari because the decision below was based on laches. The invocation of laches by the court below, however, simply framed the federal questions presented by this case. The court below ruled that Sierra Pacific was guilty of laches only because it had not pursued a remedy under state law that was simply not available until the very ruling that asserted laches. Under virtually identical circumstances, this Court held that a state court finding of laches "is not sufficient independently to support the judgment." *Brinkerhoff-*

Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673, 682 (1930).

2. The Nevada Supreme Court denied Sierra Pacific any recovery of over 14 million dollars in expenses—expenses to which it was concededly entitled—because Sierra Pacific did not seek those expenses from the Commission while litigation was pending in the courts. If that was all there was to this case, the Commission might well be correct that the case turns on laches. The federal questions that merit review by this Court arise from the fact that until the decision below, state law clearly prevented Sierra Pacific from doing what the court below said it should have done:

- State law provided that "the commission shall not consider an application by a public utility if the justification * * * includes any items of expense or rate base which * * * are the subject of pending litigation * * *." Former Nev. Rev. Stat. § 704.100(3).
- The Nevada Supreme Court had ruled that this provision meant precisely what it said. *Southwest Gas Corp.* v. *Public Service Comm'n*, 92 Nev. 48, 58, 546 P.2d 219, 225 (1976).
- The Commission itself relied upon the provision in *rejecting* an application by Sierra Pacific for the expenses, proving that Sierra Pacific could not have done what the court below said it should have. *See* Pet. at 11-12.

The court below was free to change this established view of state law, and it did. *See* App. at 8a. It was not free, however, to deprive Sierra Pacific of property to which it was concededly entitled because Sierra Pacific relied upon the previously settled state law. Such action —whether labeled laches, waiver, or anything else— constitutes a deprivation of property without due process in violation of the Fourteenth Amendment. *Brinkerhoff-Faris*, 281 U.S. at 679; *NAACP* v. *Alabama ex rel.*

Patterson, 357 U.S. 449, 457-458 (1958); *Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964).

3. The invocation of "laches" also simply frames the second federal question presented by Sierra Pacific—whether the court below denied Sierra Pacific due process by failing to afford it any notice or opportunity to be heard on factual questions implicated only by the court's unforeseeable change in state law. Even under the court's new view, Sierra Pacific could only have applied to the Commission for the subject expenses if certain facts were found to exist. *See* Pet. at 14. Sierra Pacific was denied any opportunity to be heard on those factual questions, because they were not even at issue until the court below overturned previously settled state law.

4. The recent repeal by the Nevada Legislature of Nev. Rev. Stat. §§ 704.100(3) and (5) has no effect whatever on this Petition, or on the continuing broader significance of the questions presented. Sierra Pacific is not, of course, asking this Court to construe Sections 704.100(3) and (5), or any other aspect of Nevada law. Those provisions—by barring any application by Sierra Pacific during the pendency of litigation—simply set the stage for the federal questions presented when the court below overturned settled state law. As noted in the Petition, Pet. at 18-20, state courts are overturning previously settled state law with increasing frequency, raising the same questions presented by this case. Whether or not the state law overturned by the court decision formally remains on the books is irrelevant to consideration of these federal questions.

5. Indeed, the Legislature's repeal of Sections 704.100 (3) and (5) confirms Sierra Pacific's position as to what happened in this case. Those provisions barred Sierra Pacific from seeking the expenses at issue while litigation was pending. The court below, however, in denying Sierra Pacific any relief precisely *because* it did not seek

the expenses while litigation was pending, effectively repealed Sections 704.100(3) and (5). The Legislature's action—taken after the decision below—merely ratified the change in state law effected by the court.

The Legislature's revealing action highlights the need for review by this Court. If the Legislature's action stood alone, and the Commission denied Sierra Pacific its legitimate expenses on the ground that it had not sought them earlier, retroactively applying the *Legislature's* repeal, the constitutional violation would be clear. As Justice Brandeis noted for a unanimous Court in *Brinkerhoff-Faris*, "[t]he violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute." 281 U.S. at 680.

* — * * *

For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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